United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 25, 2005

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: San Francisco Hotels Multi-Employer Group
Case 20-CA-32134

524-5056-0175
524-5056-1600
524-5056-2000
524-5056-3200
524-5056-5800
524-5056-7800

The Region submitted this Section 8(a)(3) case for advice concerning whether the Employer violated the Act under Eads Transfer[1] when it locked out economic strikers at four hotels in response to their unconditional offer to return to work, after earlier locking out employees at ten hotels in response to the Union's "whipsaw" strike.

We conclude that the Employer provided the strikers with sufficient notice of the lockout, and that it was not otherwise unlawful. Accordingly, the charge should be dismissed, absent withdrawal.

FACTS

UNITE HERE Local 2 (the Union) has been a party to successive five-year contracts with the 14-member San Francisco Hotels Multi-Employer Group (SFMEG)[2] or its predecessor since 1989. The parties' most recent agreement, covering approximately 4,350 unit employees, expired by its terms on August 14, 2004.[3]

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[1] Eads Transfer, Inc., 304 NLRB 711 (1991), enfd. 989 F.2d 373 (9th Cir. 1993).

[2] SFMEG's members include the Argent Hotel San Francisco, Crowne Plaza San Francisco Union Square Hotel, Fairmont San Francisco, Four Seasons Hotel San Francisco, Grand Hyatt San Francisco, Hilton San Francisco, Holiday Inn Civic Center Hotel, Holiday Inn Express & Suites Fisherman's Wharf, Holiday Inn at Fisherman's Wharf, Palace Hotel, Hyatt Regency San Francisco, Intercontinental Mark Hopkins San Francisco, Omni San Francisco Hotel, and Westin St. Francis.

[3] All dates hereafter are 2004, unless otherwise indicated.

Since bargaining for a successor contract began in earnest on July 20, the parties have met 19 times. They have reached agreement on various issues, including immigration and diversity, workload, expedited arbitration, subcontracting, and banquet scheduling practices. Each side has also submitted a wage proposal, and SFMEG has reduced its proposed maximum monthly employee health insurance contribution from $270 to $119. Contract duration remains a major issue in negotiations, however: the Union has proposed either a two-year contract or one containing a reopener clause that gives it the right to strike after two years, while SFMEG has proposed another 5-year contract.[4]

Following a strike authorization vote in mid-September, the Union commenced a two-week strike against four of the fourteen SFMEG hotels on September 29. On October 1, pursuant to an internal agreement to respond to "whipsaw" strikes against only some of the hotels, SFMEG implemented a lockout at its other 10 hotels for the strike's duration.[5] On October 5, the Union advised SFMEG that the striking employees would unconditionally return to work on October 13, as planned. On October 6, SFMEG voted to continue locking out employees at the 10 hotels after the two-week strike ended.

Also on October 6, SFMEG posted an explanation for the October 1 lockout on its website. The posting noted that the Union had refused to agree to a contract extension which could have averted a strike or a lockout; asserted that the Union knew its whipsaw strike would trigger a lockout at SFMEG's other hotels; and cited the need to ensure the continued operation of its hotels and to provide guests with uninterrupted service.

On October 8, the Union reiterated that the strikers at the four hotels would unconditionally return to work on October 13, stated it would call no further strikes absent an impasse, and requested that SFMEG end the lockout on October 13. On October 12, SFMEG rejected the Union's unconditional offer to return on behalf of the striking

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[4] SFMEG filed a Section 8(b)(1)(B) and (3) charge alleging that the Union's contract duration demand is an unlawful attempt to change the scope of the bargaining unit (Case 20-CB-12268, which Region 20 also submitted to Advice). The merits of that charge are addressed in a separate Advice memorandum.

[5] The Union does not allege that SFMEG's October 1 lockout is unlawful.

employees, and absent a blanket assurance that the Union would not call any further strikes, extended the lockout to all 14 member hotels effective October 13.

On October 13, strikers attempting to return to work received a notice stating that,

> This Hotel is currently involved in a labor dispute. As a result, members of UNITE HERE Local 2 who are employees of this hotel will be "locked out," and are not allowed to work at the hotel effective at 12:01 A.M. on Wednesday, October 13, 2004.
>
> If you are a member of Local 2 and an employee of this hotel, you will not be allowed to enter the hotel effective at 12:01 A.M. on Wednesday, October 13, until the dispute is resolved.

On October 14, the Union repeated that it would call no further strikes absent an impasse. On October 18, SFMEG posted the following points on its website:

- The Union took employees out on strike;
- The Union knew that doing so would result in a lockout;
- The Union irresponsibly led strikers to believe they would be back at work in two weeks;
- SFMEG members must protect their businesses and ensure continued service to guests so that unit employees will have work available when the parties reach an agreement; and
- SFMEG cannot and will not be vulnerable to random strikes.

The Union rejected SFMEG's offer to end the lockout in exchange for the Union withdrawing its two-year contract term proposal. On November 20, however, the parties agreed to a 60-day cooling off period, and the lockout ended on November 23.

The Union presented evidence that the Hyatt Regency San Francisco has permitted Peter Uttachau, a probationary sous chef hired in early September, to work during the lockout. There is no other evidence that any probationary employee, non-Union member, or former Union member has been permitted to work during the lockout. In this regard, during an October 12 conference call, SFMEG specifically decided against permitting unit employees who resigned from the Union to work during the lockout. Hyatt has failed to respond to repeated inquiries from the Region about this matter, but SFMEG's attorney asserts that Hyatt's conduct in this instance was an aberration, noting that every other

SFMEG hotel with probationary employees on its payroll locked them out.

ACTION

We agree with the Region that SFMEG provided returning strikers with legally sufficient notice of the October 13 lockout. Therefore, because we conclude the lockout was not otherwise unlawful, the instant charge should be dismissed, absent withdrawal.

In Eads Transfer,[6] the Board held that an employer can only justify its failure to reinstate economic strikers for legitimate and substantial business reasons based on a lockout by its timely announcement to the strikers that it is locking them out in support of its bargaining position. The Board explained that only after an employer has informed strikers of the lockout can they knowingly reevaluate their position and decide whether to accept the employer's terms and end the strike or to take other appropriate action.[7] Absent such notification, the Board concluded that an employer's failure to reinstate economic strikers based on a claimed lockout, after they make an unconditional offer to return to work, is inherently destructive of employees' Laidlaw[8] rights and violates Section 8(a)(3) and (1).[9] Accordingly, the Board found that the employer's refusal to reinstate economic strikers for more than two months after they unconditionally offered to return to work -- without making reference to a lockout or to bargaining demands -- was unlawful.[10] The Board stated that the employer was obligated to declare the lockout before or in immediate response to the strikers' unconditional offers to return to work.[11]

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[6] Eads Transfer, Inc., 304 NLRB 711, 712 (1991), enfd. 989 F.2d 373 (9th Cir. 1993).

[7] Ibid.

[8] Laidlaw Corp., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970) (holding that economic strikers are entitled to full reinstatement after permanent replacements depart unless the employer can establish that it failed to do so for legitimate and substantial business reasons).

[9] Eads Transfer, 304 NLRB at 712-713.

[10] Id. at 713.

[11] Ibid.

Subsequently, in Ancor Concepts,[12] the Board explained that an employer's timely announcement of a lockout does not depend on the use of "formal words" to describe its bargaining tactics. The Board thus held that the employer's assertion that it would not reinstate strikers until the parties reached a new agreement was sufficient to inform striking employees that the employer had locked them out in support of its bargaining position.[13]

Applying these principles here, we conclude that SFMEG timely announced to strikers that they were being locked out in support of SFMEG's legitimate bargaining position. Thus, SFMEG's October 13 notice, given in response to the Union's October 12 unconditional offer to return, informed returning strikers that the parties were "currently involved in a labor dispute" and that they would be locked out "until the dispute [was] resolved." Under Ancor Concepts, we conclude that SFMEG's use of the term "labor dispute" was an obvious reference to the parties' ongoing contract negotiations, and thus SFMEG made clear to the returning strikers that it was including them in the existing lockout in support of its good faith bargaining proposal.[14]

Contrary to the Union's contention, we do not regard SFMEG's October 6 and October 18 website postings as inconsistent with its October 13 lockout notice. Thus, the website postings include factually accurate statements, e.g., that the Union took employees out on strike and that doing so triggered SFMEG's October 1 lockout at the 10 nonstruck hotels, designed to ensure the continued operation of its hotels and to provide guests with uninterrupted service. A lockout in response to a whipsaw strike has long been recognized as a legitimate course of action[15] and thus, SFMEG's October 6 posting offers a valid

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[12] Ancor Concepts, Inc., 323 NLRB 742, 744 (1997), enf. denied on other grounds 166 F.3d 55 (2d Cir. 1999).

[13] Ibid.

[14] SFMEG's offer to end the October 13 lockout in exchange for the Union abandoning its demand for a two-year contract, which the Union refused to do, further demonstrates that SFMEG locked out unit employees in support of its legitimate bargaining position.

[15] See NLRB v. Truck Drivers Local 449 (Buffalo Linen Supply Co.), 353 U.S. 87 (1957). In this regard, as set forth above at n.5, the Union does not allege that SFMEG's October 1 lockout was unlawful.

business justification for its October 1 lockout. Moreover, the evidence reveals that SFMEG voted to extend the lockout to all 14 member hotels because the Union refused to give a blanket assurance against further strikes, agreeing only that it would not strike again unless, in its own estimation, the parties reached a lawful impasse. In these circumstances, we conclude that SFMEG reasonably anticipated that it might face additional "random strikes."[16] Thus, SFMEG's October 18 posting also articulated a legitimate basis for continuing the lockout: the need to protect its businesses and ensure their continued ability to operate.[17] The fact that SFMEG's website postings cited different legitimate reasons than its October 13 notice to the strikers does not establish that the October 13 lockout was unlawful.

Next, we find unavailing the Union's argument that SFMEG's October 13 lockout notice evinced an unlawful retaliatory motive because it announced that Union members, as opposed to unit members, would be locked out pending resolution of the parties' labor dispute. In the circumstances of this case, we conclude that the wording of the notice, while inartful, is of no consequence and does not establish that the October 13 lockout was merely in retaliation for the Union's strike. Thus, the evidence shows that during an October 12 conference call, SFMEG's members expressly decided not to permit unit employees who resigned from the Union to work during the lockout. Moreover, with the apparently inadvertent exception of probationary Hyatt sous chef Uttachau, there is no evidence that any of the roughly 4,350 unit employees whom the Union represents, members and nonmembers alike, were allowed to work during the lockout. We therefore conclude that SFMEG's October 13 lockout was both intended and understood as a lockout of all bargaining unit employees in support of SFMEG's contract demands and in order to protect it from further disruptions due to Union strike activity.[18]

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[16] See generally, General Portland Cement, Inc., 283 NLRB 826, 826 n.2, 838, 840 (1987)(partial lockout lawful where employer reasonably feared and sought assurances against "quickie strikes" and employees still on strike failed to give such assurances).

[17] See, e.g., Harter Equipment, Inc., 280 NLRB 597, 599 (1986), enfd. 829 F.2d 458 (3d Cir. 1987) ("There can be no more fundamental employer interest than the continuation of business operations.").

For the foregoing reasons, we conclude that SFMEG provided returning strikers with timely notice on October 13 that they would be locked out until the parties reached a contract. Because we conclude that the lockout was otherwise lawful, we agree with the Region that the instant charge should be dismissed, absent withdrawal.

B.J.K.

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[18] On this record, we need not consider recent Board decisions involving the lawfulness of partial lockouts and strikes converted to partial lockouts, e.g., Bunting Bearings Corp., 343 NLRB No. 64 (2004); Midwest Generation, EME, LLC, 343 NLRB No. 12 (2004); and Allen Storage & Moving Co., 342 NLRB No. 44 (2004).